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In the Supreme Court of the United States

OCTOBER TERM, 1968.
No. 1193

WILLIAM THOMAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals,
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals,
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The Petitioner, William Thomas, asks that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, for the Sixth Circuit, made and entered herein on February 18, 1969 (12a), dismissing his appeal. The consequence of the dismissal of this appeal was the affirmance of the judgment of the District Court, which judgment dismissed without a hearing, over objections, Petitioner's *Motion to Suppress and for the Return of Illegally Acquired Property* (4a) that was pending disposition.

OPINIONS IN THE COURTS BELOW.

The District Court, for the Northern District of Ohio, entered its order of dismissal on April 3, 1968 (9a). No formal opinion was filed at that time, or when the Court's order, upon denying Petitioner's Motion to Vacate, was made.

In the Court of Appeals, its order likewise was not supported by any formal opinion.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 8, U.S.C., § 1254, which pertinently provides that:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF QUESTIONS INVOLVED.

1. Where an accused, indicted for an alleged criminal offense, moves for the suppression and for the return of illegally acquired evidence, can the government by the simple expedient of dismissing its indictment deprive him of his right to a meaningful and definitive resolution of the constitutional issues raised in such motion?

2. Where, to the government's knowledge, it has been stipulated in a state prosecution, growing out of a search by federal agents incident to the execution of a federal arrest warrant, that the state court's judgment would be subject to the federal court's determination as to the validity of such warrant, can the government over defense objections dismiss its indictment and by such action successfully deny the accused his only meaningful opportunity to suppress as evidence, and to reacquire, property he contends was seized incident to an illegal search?

3. Can a valid arrest warrant be issued solely on the basis of conclusory allegations showing the affiant's belief that the accused had illegally sent narcotics through the mails was based on information furnished him by "reliable informants" and by various narcotic agents in another city, which allegations were only supported by the insubstantial statement that the affiant "believed" certain named police officers and agents were material witnesses to the charge?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26, U. S. C. A., § 4744 provides:

> "(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

Title 26, U. S. C. A., § 4742 provides:

> "(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF FACTS.

William Thomas, the Petitioner herein, was indicted along with a Lenore Jackson, in a three count indictment. This indictment charged him in count I with the unlawful possession, on April 21, 1966, of a quantity of marijuana (26 U.S.C. § 4742[a]), and in count II, with the unlawful transfer of marijuana, by mail, from Cleveland, Ohio, to Chicago (26 U.S.C. § 4742[a]). Count III charged Lenore Jackson, the co-defendant, with possession of this same quantity of narcotics on April 21, 1966.

The Record shows that, based on certain conclusory allegations in a formal complaint filed with the commissioner (2a), an arrest warrant charging Thomas "with acquiring marijuana without having paid the transfer tax required by the Internal Revenue Code of 1954" was issued. It was on the basis of this warrant that Thomas was arrested.

The complaint, the Record shows, was based on the following insubstantial allegations:

> "* * * this complaint is based on information furnished the undersigned, Agent James Hilbert, U. S. Bureau of Narcotics, by the Cleveland Police Department Narcotics Squad Detectives, reliable informants of the Federal Bureau of Narcotics, and agents of the U. S. Bureau of Narcotics, Chicago, Illinois.
>
> And the complaint further states that he believes agents Irvin Swank and Jack L. Lloyd, U.S. Bureau of Narcotics, Cleveland Police Department, Narcotics Squad Detectives James Veres, Walker Parhomovich and Lawrence Masek are material witnesses to this charge" (2a).

Because of the patent insufficiency of these allegations, Petitioner moved for the suppression and return of the physical evidence seized incident to the execution of the arrest warrant (4a). In his motion it was alleged,

inter alia, the arrest was made on the basis of the warrant and that the complaint was constitutionally deficient in that it failed to set forth the requisite probable cause. Further, Petitioner contended he had been illegally stopped wthout probable cause by the Cleveland Police, whose purpose was to search and inspect him as well as the contents of his car; and that having done so, these officers learned, and determined, he had in his possession a package addressed to an addressee in Chicago. It was alleged that this package was "opened and inspected" contrary to regulations before the same was delivered to its destination.

Next, the contention was made that in executing this warrant the agents, and the police who were assisting them, illegally conducted a search of the residence outside of which he was arrested, and seized therefrom certain contraband. The prayer was that the arrest warrant should be quashed and that the property seized, incident to its execution, suppressed or otherwise restored to him.

Petitioner also moved the District Court, on February 12, 1968, for an immediate trial of his case. This motion (9a) prompted the government, without notice to Petitioner, to request leave of Court to dismiss the indictment. The Court's entry of dismissal was made by the Court on April 3, 1968 (9a).

In response to this action, by the Court, Petitioner then moved the Court to vacate the order of dismissal (10a). In so doing, it was alleged, in substance, that incident to the execution of the invalid warrant, in this case, certain property was seized by the agents; which property was given to the State authorities, and had resulted in a State court prosecution against Thomas for the possession thereof. Also, the motion alleged that in the State court prosecution, in which a jury was waived,

the decision as to the validity of the warrant was, *by stipulation,* reserved for the District Court to make. This was done, it was stated, because the validity of the warrant not only entailed a consideration of the federal complaint and the warrant as written, the ultimate validity of the warrant entailed a consideration of facts showing, what was contended to be, an illegal search and seizure of contraband that had been sent to Chicago through the mails. Another allegation in the motion was to the effect that the government ought not, by the simple device of dismissing its case, be able to perpetrate a State conviction based on the possession of property seized incident to the execution of an illegal federal warrant. Nor, it was alleged, should the government be allowed to effect a silver platter type conviction by denying an accused the right to show his arrest was illegal.

Hence, it is from the Court's denial (11a) of Petitioner's motion, seeking to have the Court vacate the order of dismissal, that the appeal was taken to the Court of Appeals.

ARGUMENT.

1. Where an accused, indicted for an alleged criminal offense, moves for the suppression and for the return of illegally acquired evidence, can the government by the simple expedient of dismissing its indictment deprive him of his right to a meaningful and definitive resolution of the constitutional issues raised in such motion?

To be sure, it cannot be seriously doubted that a forum at some point along the way to allow accused persons an opportunity to fully explore the circumstances of their arrest is required. Doubtless it was for this reason Rule 41(e) of the *Rules of Criminal Procedure,* provides for and requires such a hearing prior to trial. That a fail-

ure to grant such a hearing can be a ground for reversal, even of a conviction, there likewise can be no doubt. See *Battle v. United States,* 345 F.2d 438 (D.C. Cir., 1965).

Yet, despite this, the problem here is broader. For while the government would be powerless to deny the requested hearing, if it intended to maintain its prosecution, the question still must be whether by dismissing the prosecution, can they eliminate any necessity for a hearing?

Granted the answer to this question would have to be a short one if no more were involved than the particular prosecution being dismissed. The same would be true if the only property that could be returned was contraband, the possession of which is prohibited by law.

But such is not the case here. The effect of a ruling on the motion would have collateral significances of literally gigantic proportions. *First,* there is the car that was seized, the return of which was being sought by motion. And, if it was shown that the government's seizure thereof was based on illegally acquired evidence, then it can only follow that its return would be required. *One Plymouth Sedan v. Pennsylvania,* 380 U. S. 693.

Second, there is the aspect of the motion which sought the suppression as evidence in any criminal proceeding all property seized incident to the execution of the government's defective, Aguilar-type, warrant. In this regard, not only was the Court's ruling required insofar as any possible tax liability for his alleged possession thereof; a consideration, a definite ruling as to the propriety of the warrant was required here because in a related State prosecution (based on this property seized, which property had been given to the State on "a silver platter" (*Elkins v. United States,* 364 U. S. 206)), it was stipulated that the State Court's judgment would be subject to the Federal Court's ruling as to the validity of the warrant.

In this regard, it can be further noted that in the State Court prosecution, petitioner was adjudged guilty of the crime of possession of narcotics, found in his possession when he was arrested, on the basis of the federal warrant in this case. Also, it is a fact that in the State Court prosecution, the trial judge did not pass on either the validity of the warrant or the sufficiency of the supporting affidavit. Yet, it was conceded and stipulated that that conviction necessarily would be subject to a ruling as to the validity of the warrant, which ruling it was anticipated would be made in this case that was pending at the time.

II.

Since the District Court did not set forth the basis for its ruling, we are left with the inescapable conclusion that the Court dismissed this case because that's the way the government wanted it. And since the government motives in seeking the dismissal could not be clearer, on this basis alone, there must be a Court somewhere to whom the complaint that the government's ulterior motives were to avoid having their warrant declared defective, and to avoid a ruling suppressing the fruits of their search.

In the government's argument against this appeal it will probably be contended that the entry of dismissal not only eliminated the case but the same mooted all pending motions. Our response to this is that the remedy provided for in Rule 41(e) must be regarded as an independent action, where it seeks relief broader than the mere suppression of evidence in a pending criminal prosecution. See *DiBella v. United States,* 369 U. S. 121.

Thus, in this case, the position is taken that, conceding the Court could dismiss the indictment, the effect of such dismissal could in no way eliminate the petitioner's right to seek, by motion, the suppression and return of il-

legally acquired property. Further, that having dismissed the indictment, the Court was required to regard the motion as an independent suit in equity.

In support of this thesis, the Court's attention is directed to the following analysis. *First,* the decision in *Carroll v. United States,* 354 U. S. 394, at 405, voices the idea that the essential character and the circumstances under which a motion to suppress is made determines whether it is an independent proceeding, or merely a step in the criminal case. If it can be regarded as an independent proceeding then its denial would be appealable. See *DiBella v. United States, supra.*

Next, there is authority for the position that "where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the Court's order therein is appealable as a final decision." *United States v. Rosenwasser,* 145 F. 2d 1015 (9th Cir., 1944).

From these cases, it must be clear than an action seeking suppression and return of illegally acquired property can be maintained independent of a criminal action. Hence, in this case where there was a criminal action when the motion was filed, the elimination of the case should not suffice to eliminate the motion. This is particularly so since it is clear that, unlike the situation in *Parrish v. United States,* 376 F. 2d 601, the government does not intend to present any further prosecutions against petitioner in which these issues can be raised. In *Parrish,* of course, the Court held that considering the fact that the issues raised by the motion could be considered as a part of a pending criminal case, the District Court could properly refuse to regard an action for the return granted both in equity and on the basis of Rule 41(e) as an independent

action. The opposite of this, of course, must be that where there is no such criminal action, it must be regarded as an independent action on its own merit.

Based on the above syllogism, it is our view that the District Court was required to consider the merits of petitioner's motion, and that it is unthinkable that the government can arrest an accused, seize his property, turn some of this property over to the State (thus allowing them to institute a separate state prosecution), purposefully delay his arraignment in violation of Rule 5(a), insist on a high bond at his arraignment, and when he ultimately files a motion challenging the lawfulness of his arrest and asks for the return of his property, the government can dismiss its case and that is the end of it.

2. Where to the Government's knowledge it has been stipulated in a state prosecution, growing out of a search by federal agents incident to the execution of a federal arrest warrant, that the State court's judgment would be subject to the federal Court's determination as to the validity of such warrant, can the government over defense objections dismiss its indictment and by such action successfully deny the accused his only meaningful opportunity to suppress as evidence, and to reacquire, property he contends was seized incident to an illegal search?

As the above statement of facts shows, Petitioner was arrested on the basis of a warrant (3a) issued by the U. S. Commissioner. The warrant, in turn, was based on Agent Hilbert's formal complaint (2a). This complaint, of course, charged Thomas with a specific federal offense.

It was contended in this case, by motion, that the warrant was issued without the requisite probable cause having been satisfactorily demonstrated. (See 41[c], Federal Rules of Criminal Procedure.) Also, it is here contended,

as was contended below, that even a cursory reading of these papers shows that the infirmities the U. S. Supreme Court found present in the affidavits of *Aguilar v. Texas,* 378 U. S. 108 and *Giordenello v. United States,* 357 U .S. 480.

In this case, as documented above, when the federal arrest was made, Petitioner was found to be in possession of an additional supply of narcotics—*i.e.*, marijuana. However, for reasons that have not been stated, he was prosecuted in the State Court for the possession of this contraband. The primary witnesses were federal officers. The chemist who defined this substance, testified he was employed by the government and that the narcotics had been in government custody.

From these circumstances, it is apparent there was complete cooperation between the state and federal prosecutors in this case. Thus if it was not known, by the government, by virtue of such joint participation, that the issue as to the validity of the warrant was not considered in the State prosecution, the government was specifically informed in Petitioner's motion by which he sought to have vacated the Court's order dismissing the indictment and the Motion to Suppress (10a).

Of course, as Thomas' motion shows, the reason the validity of the warrant was not being tested in the State Court was because its full and proper evaluation entailed a consideration not merely of the warrant per se, but a consideration of the action of agents of other branches of the government in both Ohio and Illinois. Also, there was the presence of Lenore Jackson, as a co-defendant in this case. A circumstance of no small importance in this case. For if the search of the home in Chicago, where the narcotics in this indictment were found, was illegal, then its suppression necessarily would have benefited the

Petitioner. See *McDonald v. United States*, 335 U. S. 451; *Hair v. United States*, 289 F. 2d 894; and *Schoeneman v. United States*, 317 F. 2d 173.

Again, it is our view that one victimized by an illegal search and seizure must have a right at some time to a determination as to whether his rights have been violated. We contend that this right entitled him to such a hearing in the District Court. Moreover, it is our view that his entitlement to this hearing is strengthened by the fact that it was stipulated that a State Court conviction, based on the seizure made incident to the federal arrest, would be subject to the federal court's decision as to the validity of the warrant. A circumstance of even greater significance here since the federal agents who arrested the accused testified in the State case.

If this is the law, then clearly it cannot be that the government can, by unilateral action, deprive this Petitioner of such right, nor can the District Court's action in submitting their will be said to be the end of it.

3. Can a valid arrest warrant be issued solely on the basis of conclusory allegations showing the affiant's belief that the accused had illegally sent narcotics through the mails was based on information furnished him by "reliable informants," and by various narcotic agents in another city, which allegations were only supported by the insubstantial statement that the affiant "believed" certain named police officers and agents were material witnesses to the charge?

If anything in the area of searches and seizures is beyond dispute it is the fact that while a search warrant may be based on hearsay, even from informants whose identity need not be disclosed, the affidavit supporting the

issuance of such warrant must show the underlying circumstances establishing the belief that a particular offense has been committed and the underlying circumstances from which the affiant concluded that his informant was reliable or his information credible. *Aguilar v. Texas,* 378 U. S. 108. Also see *Giordenello v. United States,* 357 U. S. 480, relied on in *Aguilar,* where the Supreme Court voided an arrest warrant which failed to set forth a sufficient factual pattern to support the issuance of an arrest warrant.

Thus, the apparent rationale that must be shown before it may be concluded an alleged informant is "reliable," is the fact that the mere statement by an officer that his informant is reliable is but a naked conclusion; hence, as such, is not sufficient to justify the issuance of a warrant. What is required is further information informing the magistrate of "some of the underlying circumstances" from which the alleged informant drew his conclusions, and "some of the underlying circumstances" from which the officer concluded that his informant was "credible" or his information "reliable." *Aguilar v. Texas,* 378 U. S., at 114-115.

Absent such further information in this case, it is clear that the issuance of the warrant in this case rather being drawn by the commissioner, "the inferences drawn from the facts which lead to the complaint" were drawn not by a neutral and detached magistrate, but by officers "engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. United States,* 357 U. S., at 486.

In further assailing the issuance of this warrant, the following contentions, provable by a cursory look at the complaint and warrant, are made:

> *First,* the complaint fails to set forth any of the underlying circumstances from which the commis-

sioner could determine that the alleged informant either existed, or if he existed, that he was reliable. See *United States v. Follette*, 267 F. Supp. 342 (S. D. N. Y., 1967).

Second, the complaint fails to set forth the undisclosed information the informant supposedly supplied, and for that matter the complaint even failed to set forth the source of any information the informant may have had.

Third, the complaint fails to indicate the recency of the informant's information.

In summary then, there is no indication, nor can there be, other than that the arrest warrant in this case was issued merely because the commissioner was convinced the agent believed probable cause existed. But this is adverse to the requirement that it is the magistrate who must be convinced by the facts and underlying circumstances that there is probable cause (*United States ex rel. Rogers v. Warden*, 381 F. 2d 209 [2d Cir., 1967]). For it cannot be denied when the magistrate abdicates his duty in this regard, when he fails to "make his independent judgment on all the known facts, then he tends to become merely the tool of police interest." *Jones v. United States*, 362 U. S. 257, 273 (concurring opinion).

CONCLUSION.

For each of the above reasons, expressed herein on behalf of Petitioner, it is hereby urged that this Court should grant Certiorari, and upon review should reverse the judgment below.

Respectfully submitted,

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